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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1380
-1667

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CHEMEHUEVI TRIBE OF INDIANS, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
One Chase Manhattan Plaza
New York, New York 10005
Attorney for
Edison Electric Institute

Of Counsel:

HARRY H. VOIGT
E. DAVID DOANE

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BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

In accordance with this Court's Rule 42, Edison Electric Institute has received the consent of counsel for all other parties to file this brief *amicus curiae.*

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 193 operating companies which supply electricity to 77 percent of all the electric service customers in the United States. This brief is sub-

mitted in support of the Petition for a Writ of Certiorari being filed by the Solicitor General for the Federal Power Commission. EEI also supports a similar petition being filed by Arizona Public Service Co., *et al.*, intervenors in the court below.

The decision below[1] would impose Federal Power Commission ("FPC") licensing jurisdiction on the use of cooling water by thermal-electric generating plants, if the water is found by the FPC to be "surplus water" drawn from either of two sources: a reservoir behind a dam operated by an agency of the Federal Government, or any portion of a river located downstream from a Government dam.[2] A substantial number of the estimated 876 thermal power plants planned for construction and operation between 1970-1990 will draw cooling water from these two sources.[3]

Approximately 700 major dams are currently operated by federal agencies.[4] The decision below has set

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[1] Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (D.C. Cir. 1974). The decision is reprinted with Federal Reporter pagination in the Appendix to the Petition for Certiorari filed by Arizona Public Service Co., *et al.*

[2] A modern 1000 megawatt fossil-fueled plant with a "once-through" cooling system requires a water flow through the condenser of about 1500 cubic feet per second. FPC, 1970 National Power Survey, pt. I, at I-1-25 (1971).

[3] *Id.* at I-1-17, Table 1.2. During the period 1970-1990, it will be necessary to almost quadruple the industry's present generating capacity to meet projected demand.

[4] Included in this category are TVA-operated hydroelectric facilities, flood control and multiple-purpose dams operated by the U.S. Army Corps of Engineers, and storage dams operated by the Department of the Interior Bureau of Reclamation. Approximately 500 additional dams are operated by the Corps of Engineers and the Bureau of Reclamation for navigational and water diversion purposes.

the stage for a series of jurisdictional confrontations between those agencies and the FPC. A formal license application to the FPC would be required to determine two issues: whether "surplus water" would be utilized for a proposed power plant and, if so, whether it should be used for cooling purposes or committed to competing uses. Resolution of those issues will inevitably require substantial delays in the approval of construction sites for new electric generating plants. Individual utilities will be faced with one more uncertainty in the planning process, not accompanied by offsetting regulatory benefits.

Edison Electric Institute believes that the decision below would impose a totally unnecessary federal regulatory scheme upon the present federal-state regulation of power plant siting and operations. More important, the resulting interagency conflict would impair the ability of the electric utility industry to continue to provide the nation with an adequate supply of electric energy.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Edison Electric Institute believes that a writ of certiorari should be granted because the lower court's construction of the "surplus water" clause and the resulting extension of FPC jurisdiction cannot be reconciled either with this Court's analysis of the Commission's jurisdiction in *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), or with the lower court's own analysis of the legislative history and purposes of the Federal Water Power Act.

Since the first year of its existence, the Federal Power Commission has consistently held that it lacks jurisdiction to license steam-electric generating plants.

The decision by the Court of Appeals reverses that 53-year-old rule with respect to plants using "surplus water." It ignores a pattern of legislation going back to 1906 expressly granting jurisdiction over the disposition of "surplus water" to other Government departments and agencies.

I.

THE DECISION BELOW FAILS TO REFLECT THE LIMITATION OF FPC JURISDICTION DETERMINED BY THIS COURT IN TAUM SAUK.

In construing the "surplus water" clause of Section 4(e) of the Federal Power Act,[5] the court below has extended FPC jurisdiction far beyond the concerns that prompted Congress to enact the original Federal Water Power Act in 1920. The decision of the Court of Appeals is inconsistent with this Court's finding in the *Taum Sauk* case, *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), that an "obvious distinction" removes steam-electric generating plants from the regulatory scheme contemplated by Congress in 1920.

In *Taum Sauk*, it was held that Section 23(b) of the Federal Power Act[6] requires an FPC license for construction of a pumped-storage hydroelectric project utilizing the waters of a non-navigable river subject to federal jurisdiction to generate electricity for interstate transmission. The argument was made there that if FPC licensing jurisdiction is based on the interstate transmission of energy, there can be no basis for distinguishing between a steam-electric plant and a hydroelectric facility, if each generates electricity for interstate transmission and uses water subject to fed-

[5] 16 U.S.C. § 797(e) (1970).

[6] 16 U.S.C. § 817 (1970).

eral jurisdiction. This Court rejected that argument, finding that the two types of generating plant are distinguishable on the basis of the "central concern" of the Act:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U.S. at 110.

This distinction provides the barrier preventing a jurisdictional leap to all steam-electric plants generating electricity for interstate transmission and using cooling water over which Congress has jurisdiction. It does not result from any intricate construction of the language of Section 23(b). Rather, it is found in the "central concern" of the original Federal Water Power Act.

In construing the "surplus water" clause of Section 4(e), the court below expressly found that no such distinction exists. After observing that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power," 489 F.2d at 1242, the court concluded:

> "At a minimum Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.*

Support for that conclusion was not derived from the legislative history of the Federal Water Power Act. Indeed, the court found that "there is little in the way

of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause . . . and there apparently is no useful legislative history." 489 F.2d at 1236-7.

The decision refers instead to pre-1920 Supreme Court cases and acts of Congress relating to the federal leasing and sale of surplus water power. The lower court's historical analysis includes only one explicit reference to congressional interest in control of water uses unrelated to water power. In 1917 Congress created a Waterways Commission which was empowered to coordinate and plan virtually all aspects of water resources development.[7] Noting that the Federal Water Power Act explicitly repealed the act creating the Waterways Commission, the Court of Appeals assumed that all of the broad duties granted to the Waterways Commission were simply relocated in the FPC. That assumption is inconsistent with the purposes of the Federal Water Power Act described by this Court in *Taum Sauk,* and it is also contradicted by the lower court's own exhaustive account of the Federal Water Power Act's legislative history contained in the portion of the decision construing the "project works" clause of Section 4(e). The Act of 1917 provides no valid historical basis for assuming that Congress, in enacting the Federal Water Power Act, was concerned with the use of surplus water unrelated to its use for hydroelectric power.

The Court of Appeals relied extensively on the legislative history of the Federal Water Power Act in finding that the FPC lacks jurisdiction under the "project works" clause. However, the lower court abruptly

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[7] Act of August 8, 1917, ch. 49, 40 Stat. 250.

abandoned its analysis of the legislative history when it turned to the "surplus water" clause in the same section of the Act. The result was a literal construction of the clause which is plainly erroneous when juxtaposed with the court's own earlier descriptions of the legislative history:

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power.
>
> * * *
>
> "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness." 489 F.2d at 1222-3, 1231.[8]

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[8] The court's conclusions are well supported by excerpts from the legislative history cited in the decision.

> "The industrial expansion . . . has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 percent since 1914. This increase . . . has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. . . .
>
> "*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry."

Letter dated Feb. 27, 1918 from Secretaries of War, Interior, and Agriculture transmitting H. R. 8716, 65th Cong., 2d Sess. (1918). (Emphasis added.)

> "The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants at the mine itself and operate all in great interstate systems."

Report from Secretary Houston to the House, H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

Having made these observations, the court below proceeded to ignore them in construing the "surplus water" clause, insisting that no useful legislative history exists to explain the congressional purpose in enacting that clause. The apparent requirement for excerpts from the legislative history pertaining directly to the "surplus water" provision defies explanation. Such a requirement was not imposed by either the majority or the dissenting Justices in *Taum Sauk* when they construed the "interests of commerce" provision of Section 23(b).

The Court of Appeals, in applying relevant legislative history to only one of the two clauses construed in the decision below, has injected into its decision a massive inconsistency involving important questions of FPC jurisdiction. The result is also inconsistent with the statutory interpretation adopted by this Court in *Taum Sauk*.

II.

THE DECISION BELOW MISREADS THE EFFECT OF FEDERAL LEGISLATION AUTHORIZING OTHER AGENCIES TO DISPOSE OF "SURPLUS WATER".

In its analysis of the background of the Federal Water Power Act, the court below noted earlier legislation, particularly the 1906 amendments to the Reclamation Act,[9] empowering the Secretary of Interior or the Secretary of War to dispose of surplus water from a Government dam. 489 F.2d at 1238-9. The Court of Appeals also noted a series of post-1920 statutes containing similar grants of authority. 489 F.2d at 1241. From that pattern of legislation, the lower court erected the

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[9] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

premise that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 489 F.2d at 1242. From that premise, the Court of Appeals proceeded to the conclusion that Congress intended the FPC to exercise that control.

The contrary conclusion more readily squares with the statutory pattern. Congress has repeatedly designated other agencies to lease or sell surplus water. For what purpose would it confer upon the FPC a redundant power to authorize the same uses? More sensible is the construction that Congress intended a division of authority, with the appropriate Secretary empowered to dispose of the surplus water, and the FPC chartered to license the construction of any "project works" to make use of that water. In that reading, of course, the "project works" required to be licensed would be limited under *Taum Sauk* to hydroelectric projects. If no hydroelectric "project works" were required to use the surplus water, there would be no need to seek an FPC license.

A second incongruity is raised by the lower court's conclusion that "Congress surely intended to give the FPC control over the use of surplus water for the generation of power, no matter by what mechanical force the electricity is ultimately produced." 489 F.2d at 1242. If so, why did Congress repeatedly after 1920 pass legislation conferring that power upon other agencies? We think those subsequent laws make plain that Congress had no idea in 1920 that it was giving plenary authority to the Federal Power Commission to license the use of "surplus water." The absence of any such

intent is borne out by the lack of separate legislative history for the "surplus water" clause.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
One Chase Manhattan Plaza
New York, New York 10005
Attorney for
Edison Electric Institute

Of Counsel:

HARRY H. VOIGT
E. DAVID DOANE

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